

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 15, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP1003

Cir. Ct. No. 2006CF65

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLINT SCOTT MOSAY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Burnett County:
EUGENE D. HARRINGTON, Judge. *Reversed in part and cause remanded with
directions.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Clint Mosay appeals that part of an order denying his motion for sentence credit.¹ Mosay argues he is entitled to an additional 323 days of sentence credit because there is a factual connection between the time he spent in custody and the course of conduct for which he was concurrently sentenced. We agree and reverse that part of the order denying Mosay's motion for sentence credit.

BACKGROUND

¶2 On July 17, 2005, Mosay was arrested for stabbing a person to death—conduct that led to the charges in the present case, Burnett County Circuit Court case No. 2006CF65. On the same day as the arrest, Mosay was placed on an extended supervision hold in Burnett County Circuit Court case No. 2002CF191. As a result of Mosay's suspected involvement in the stabbing, the Department of Corrections commenced revocation proceedings and, on March 22, 2006, Mosay's extended supervision in case No. 2002CF191 was revoked. At a June 5, 2006 reconfinement hearing, Mosay received a time-served disposition of 335 days of incarceration with any remaining time on his sentence converted to extended supervision.² On the same day as the reconfinement hearing, however, the State charged Mosay with first-degree reckless homicide in the present matter, and he remained in custody.

¹ Because Mosay does not challenge the part of the order denying his alternative motion for plea withdrawal, we are not reviewing it in this appeal.

² The parties agreed to the time-served disposition, even though Mosay's mandatory release date was more than one month away. As explained at the reconfinement hearing, the parties wanted to avoid the inefficiency of sending Mosay to prison only to immediately require his return to face charges in the stabbing case.

¶3 Mosay was convicted of the crime charged and, on May 6, 2008, the circuit court imposed a thirty-year sentence consisting of fifteen years' initial confinement followed by fifteen years' extended supervision. The sentence was imposed "concurrent to other sentences" and the court awarded credit for the time Mosay spent in custody from the June 5, 2006 reconfinement hearing in case No. 2002CF191 to the May 6, 2008 sentencing hearing in the present case. The judgment of conviction was affirmed on direct appeal. *See State v. Mosay*, No. 2008AP2909-CR, unpublished slip op. (WI App Dec. 22, 2009).

¶4 In May 2014, Mosay filed the underlying postconviction motion for plea withdrawal and sentence credit. Relevant to this appeal, Mosay sought credit for the 323 days spent in custody from his July 17, 2005 arrest until the June 5, 2006 reconfinement in case No. 2002CF191. After a hearing, the circuit court denied the motion and this appeal follows.

DISCUSSION

¶5 Whether a defendant is entitled to sentence credit pursuant to WIS. STAT. § 973.155 (2013-14)³ is a question of law we review independently. *State v. Rohl*, 160 Wis. 2d 325, 329, 466 N.W.2d 208 (Ct. App. 1991). The statute provides that "[a] convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed." WIS. STAT. § 973.155(1).

³ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

¶6 For custody credit to be applicable, a factual connection must exist between the course of conduct for which the sentence is imposed and the presentence custody at issue. *State v. Johnson*, 2009 WI 57, ¶3, 318 Wis. 2d 21, 767 N.W.2d 207. Further, custody credit may be equally applicable to multiple concurrent sentences. *State v. Beets*, 124 Wis. 2d 372, 383, 369 N.W.2d 382 (1985). When the necessary factual connection is present, presentence custody credit must be applied to each of the concurrent terms to which a defendant is sentenced. *State v. Ward*, 153 Wis. 2d 743, 746-47, 452 N.W.2d 158 (Ct. App. 1989). Applying presentence credit against only one of the concurrent terms defeats the concurrent nature of the sentence. *Id.* at 745. The sentence credit statute is designed to assure there is power to give dual credit in appropriate cases, including “when a new sentence is imposed to run concurrently with a revoked [supervision].” *State v. Boettcher*, 144 Wis. 2d 86, 99 & 100 n.4, 423 N.W.2d 533 (1988).

¶7 Here, there is no dispute that Mosay was in custody. The question is whether a factual connection exists between the course of conduct for which the sentence was imposed and the presentence custody at issue. Mosay’s extended supervision in case No. 2002CF191 was revoked because of the stabbing incident underlying his conviction in case No. 2006CF65. Thus, there is a factual connection between the course of conduct for which the sentence was imposed in the present case and the presentence custody that began on July 17, 2005.

¶8 Given the concurrent nature of Mosay’s sentences, the State concedes Mosay is entitled to additional sentence credit, but disputes the amount, claiming Mosay is entitled to credit for only 249 of the 323 days sought. Specifically, the State asserts that Mosay should be credited only with the time spent in custody from the date of his arrest until the date his extended supervision

was revoked. Citing *Beets*, the State contends that once Mosay's extended supervision was revoked, any connection the custody in that case had to the pending charges in case No. 2006CF65 was severed. We disagree.

¶9 In *Beets*, the defendant was on probation for two earlier drug offenses when he was arrested for burglary. *Beets*, 124 Wis. 2d at 373-74. His probation was revoked about two months after his arrest for the burglary, and approximately one month after that he was sentenced on the earlier drug charges to serve two concurrent, three-year prison terms. *Id.* at 374-75. Beets did not return to the Milwaukee circuit court until approximately seven months later, at which time he entered a guilty plea to the burglary charge and was sentenced to a three-year term that was to run concurrently with his earlier two sentences. *Id.* at 375. On the new charge, he was granted sentence credit for the time between his arrest for the new charge and the date of his sentencing after probation revocation on the old charges. *Id.* Beets sought sentence credit for the days between when he began serving his prison sentences on the earlier charges and the date he was sentenced on the burglary charge. *Id.* at 375.

¶10 Our supreme court ultimately determined that Beets was not entitled to sentence credit for the time he spent in prison serving his earlier sentences, reasoning that once Beets was sentenced in the probation revocation cases, the connection between the charges ended. *Id.* at 378-79. As this court noted in *State v. Presley*, 2006 WI App 82, ¶9, 292 Wis. 2d 734, 715 N.W.2d 713, “the lynchpin

to the uncoupling of the connection between the new and old charges was the act of sentencing, not the revocation determination.”⁴

¶11 In *Presley*, the defendant sought custody credit from the date of his arrest until the date of his reconfinement hearing. There, as here, the State asserted the defendant was entitled to credit “only for the time between the date of his arrest and the date of his extended supervision revocation.” *Id.*, ¶10. The *Presley* court rejected this argument, concluding “a reconfinement hearing is a ‘sentencing,’ and under *Beets*, it, not the revocation, severs the connection between the charges.” *Id.* “Thus, an offender who has had his or her extended supervision revoked is entitled to sentence credit on any new charges until the trial court ‘resentences’ him or her from the available remaining term of extended supervision.” *Id.*, ¶13. Pursuant to *Presley*, Mosay is entitled to additional sentence credit from the date of his arrest to the date of his reconfinement hearing. We therefore reverse that part of the order denying sentence credit and remand the matter to the circuit court to amend the judgment of conviction to award an additional 323 days of credit.

⁴ We note that reconfinement hearings where the circuit court determined the appropriate term of reincarceration following the revocation of extended supervision have since been eliminated from Wisconsin’s revocation procedure. The authority to determine a defendant’s sentence after revocation is now held by the Division of Hearings and Appeals. See *State v. Brimer*, 2010 WI App 57, ¶7 n.2, 324 Wis. 2d 408, 781 N.W.2d 726; see also 2009 Wis. Act 28. The administrative code provides that if an administrative law judge decides to revoke a period of extended supervision, “the administrative law judge shall include a determination of the period of reconfinement” taking into consideration certain criteria. WIS. ADMIN. CODE § HA 2.05(7)(f) (May, 2010). Thus, it appears that under new procedures, the revocation order and reconfinement determination occur at the same time.

By the Court.—Order reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

